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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GERALD ALLEN REZES, Plaintiff and Appellant, v. CITY OF FONTANA et al., Defendants and Respondents.	E035445 (Super.Ct.No. SCV 096908) OPINION

APPEAL from the Superior Court of San Bernardino County. Tara Reilly, Judge. Affirmed.

Stanley W. Hodge and Arshak Bartoumian for Plaintiff and Appellant.

Rinos & Martin, Linda B. Martin and M. Christopher Hall for Defendants and Respondents.

Plaintiff and appellant Gerald Allen Rezes appeals after the trial court granted summary judgment in favor of defendants and respondents City of Fontana (the City), the

police chief and two police officers on plaintiff's claims of civil rights violations. We affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff is a 62-year-old man who suffers from bipolar disorder. As of July 9, 2001, plaintiff had not been taking the prescribed medications for his bipolar disorder for approximately eight or nine months. Plaintiff was irritated, upset and not thinking clearly on that day.

On July 9, 2001, plaintiff went to his chiropractor's office. He was surprised to see his daughter, his daughter's husband, and his grandchildren also at the chiropractor's office. For some reason, plaintiff was irritated with his son-in-law; he called him a rude name and made an obscene gesture. Plaintiff walked out of the office. Plaintiff's son-in-law followed plaintiff outside, and confronted him near plaintiff's truck. They exchanged angry words and a couple of shoves; then plaintiff produced a gun from his back pocket, cocked the hammer, and pressed the barrel against his son-in-law's stomach. The son-in-law pushed plaintiff to the ground. Plaintiff got up, and said that he would not kill his son-in-law then, because a witness (another customer in the parking lot) was present. Plaintiff said, "I will get you later." Then he clambered into his truck and drove away. Plaintiff's son-in-law returned to the office and called police. He described plaintiff and plaintiff's vehicle, and reported plaintiff's address.

The police radio broadcast the allegation of an assault with a deadly weapon and making criminal threats. (Pen. Code, §§ 245, subd. (a)(2), and 422.) Officers Burton and Ohler responded to plaintiff's residence. Plaintiff's truck was parked outside. The

officers knocked on the door. At first, plaintiff did not respond, but eventually he opened the door and came out onto the porch. Plaintiff's pockets were bulging. (It turned out that plaintiff had a television remote control device in his back pocket.) The officers ordered him to turn around and place his hands on his head. Plaintiff believed that he complied promptly, but the officers stated that plaintiff was slow to comply. Eventually, however, plaintiff did as he was told.

One of the officers approached, grasped plaintiff's right wrist, swung the arm down behind plaintiff's back and placed one handcuff on plaintiff's right wrist. Plaintiff complained of pain, let loose with a string of invective, stiffened his arm and body, and began to turn toward the officer.

Both officers then attempted to gain control over plaintiff. Although plaintiff said he was "not really" resisting the officers, he admitted that he hurled curses at them and shifted his body to relieve his pain. The second officer felt something tugging at his belt. He put his hand to his holster and pressed down on the grip of his weapon – what he termed "capping" his gun – to prevent its removal from the holster. The officer's hand closed on plaintiff's left hand.

Using a "stripping" technique, the officer pried plaintiff's hand from the butt of his weapon, and twisted plaintiff's arm up and behind plaintiff's back, in a control hold. Plaintiff felt his elbow pop. He cried out in pain and anger, but he no longer resisted the officers. They were able to place plaintiff face down on the ground without further incident.

In plaintiff's version of the incident, he never reached for the officer's weapon, and he was already on the ground when his left arm was twisted behind his back.

The officers called for medical attention. Plaintiff's elbow had been dislocated. Plaintiff's complaint averred that he had to have two surgeries to repair the injury to his arm. After hospital treatment, plaintiff was arrested and charged with assault with a deadly weapon and making criminal threats.

Ultimately, plaintiff was charged by criminal complaint with two misdemeanor violations: Penal Code section 417, subdivision (a)(2) (exhibiting a firearm) and Penal Code section 148, subdivision (a)(1) (resisting a police officer). Plaintiff pled nolo contendere to the resisting a peace officer charge.

Thereafter, plaintiff filed this action against the City, the police chief, and the officers for alleged civil rights violations, under title 42 United States Code Annotated section 1983 (§ 1983); the alleged violations consisted of false imprisonment and use of excessive force.

Defendants moved for summary judgment. They asserted that plaintiff could not maintain a cause of action for false imprisonment or false arrest, because there was probable cause for his arrest. They likewise asserted he could not prevail on a claim for use of excessive force, because the undisputed circumstances failed to show that any unreasonable force was used to effectuate the arrest. Defendants further asserted that they were entitled to immunity for their actions, and that plaintiff's claims were precluded under *Heck v. Humphrey* (1994) 512 U.S. 477 [114 S.Ct. 2364, 129 L.Ed.2d 383]. In *Heck v. Humphrey*, *supra*, 512 U.S. 477 [114 S.Ct. 2364, 129 L.Ed.2d 383], the

United States Supreme Court held that "to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [section] 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." (*Id*. at pp. 486-487 [114 S.Ct. 2364, 2372], fn. omitted.)

The trial court granted the motion for summary judgment. After a notice of entry of judgment was filed, plaintiff filed this appeal.

ANALYSIS

I. Standard of Review

After a motion for summary judgment has been granted, the appellate court "examine[s] the record de novo and independently determine whether [the] decision is correct. [Citation.]" (*Colarossi v. Coty US Inc*. (2002) 97 Cal.App.4th 1142, 1149.) We use the same three-step process employed by the trial court. First, we identify the issues raised by the pleadings. Second, we determine whether the moving party's showing establishes facts sufficient to negate the opposing party's claims, and to justify judgment in the moving party's favor. If so, third, we determine whether the opposing party has raised a triable material issue of fact. (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 392.)

II. Step One – Issues Tendered by the Pleadings

Here, the issues tendered by the pleadings are not in dispute. Plaintiff's complaint alleges civil rights violations under section 1983, consisting of false imprisonment/arrest, and use of excessive force in effectuating the allegedly illegal arrest.

III. Step Two – Defendants' Showing Was Sufficient to Justify Judgment in Their Favor

Defendants' moving papers established facts which were more than sufficient to justify a judgment in their favor.

Probable cause existed for the arrest. Here, the officers had sufficient information reasonably to believe that plaintiff had committed a felony. Plaintiff had pointed a cocked pistol at his son-in-law, and pressed the barrel into the son-in-law's stomach. Plaintiff plainly admitted this at his deposition. An arrest without a warrant is proper where officers have probable cause to believe a felony has been committed. (Pen. Code, § 836, subd. (a)(3); *People v. Price* (1991) 1 Cal.4th 324, 410.)

Plaintiff cannot show that excessive force was used to effect the arrest. Defendants' moving papers showed that plaintiff eventually complied with orders to turn around and place his hands on his head. The first officer took down his right hand, and applied a handcuff to the right wrist. Plaintiff screamed obscenities and claimed that he was hurt. He was verbally abusive, and turned to look at the officer. The second officer moved in to help control plaintiff. This officer twisted plaintiff's left wrist behind his back and pushed upward toward the high center of plaintiff's back. This is an ordinary and common "compliance hold," used to render a suspect noncombative. Here, the hold

was employed to induce plaintiff to stop struggling, so the second handcuff could be placed on plaintiff's left wrist.

The police officers were entitled to immunity for their actions. Penal Code section 847 provides that, "(b) There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer . . , acting within the scope of his or her authority, for false arrest or false imprisonment arising out of any arrest under any of the following circumstances:

"(1) The arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful."

Here, the arrest was lawful, and the officers had reasonable cause to believe the arrest was lawful.

Finally, plaintiff's claims are precluded under *Heck v. Humphrey*, *supra*, 512 U.S. 477 [114 S.Ct. 2364, 129 L.Ed.2d 383]. Plaintiff's complaint contains allegations which clearly deny the legality of his conviction for resisting arrest. As to his first cause of action, the complaint stated plainly that the officers "had no warrant for the arrest of the plaintiff, no probable cause for the arrest of plaintiff, and no legal cause or excuse to seize the person of the plaintiff." Plaintiff further alleged: "Plaintiff at the time was a 62-year-old person and had not physically resisted or assaulted the defendants in any way," and that "At no time during the events . . , was plaintiff intoxicated, incapacited [*sic*], or a threat to the safety of himself or others, or disorderly. He had not committed any criminal offense." These allegations were realleged and reincorporated in the second

cause of action. On its face, therefore, plaintiff's complaint flatly denied the validity of his conviction for resisting a peace officer.

In *Heck v. Humphrey*, *supra*, 512 U.S. 477 [114 S.Ct. 2364, 129 L.Ed.2d 383], the United States Supreme Court explained that section 1983 claims predicated upon the invalidity of a conviction, when that conviction remains valid, cannot be maintained. A claim of civil rights violation under section 1983 is a species of tort claim. (*Id*. at p. 483 [114 S.Ct. 2364, 2370].) Tort recovery requires a cognizable damage. Where the sole "damage" consists of the supposed unlawfulness of a criminal conviction, the plaintiff must show that the criminal conviction has already been invalidated or called into question by other means.

If the prior determination of the invalidity of the conviction is not required, a convicted person could be compensated with money damages for the supposed invalidity of a conviction which nevertheless remains intact and valid. The parallel civil suit could result in "'. . . two conflicting resolutions arising out of the same or identical transaction.'" (*Heck v. Humphrey*, *supra*, 512 U.S. at p. 484 [114 S.Ct. 2364, 2371, 129 L.Ed.2d 383].) The law cannot countenance such an end-run around the validity and finality of a criminal judgment. The "principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, . . ." (*Id*. at p. 486 [114 S.Ct. 2364, 2372].)

Thus, where a favorable result for the plaintiff on a section 1983 claim "would necessarily imply the invalidity of his conviction or sentence . . . , the complaint must be

dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." (*Heck v. Humphrey*, *supra*, 512 U.S. at p. 487 [114 S.Ct. 2364, 2372, 129 L.Ed.2d 383].)

Under the application of *Heck v. Humphrey*, therefore, plaintiff's section 1983 claim was not cognizable. This was sufficient to entitle defendants to judgment in their favor.

IV. Step Three – Plaintiff Fails to Demonstrate the Existence of a Triable Issue of Material Fact

Plaintiff focuses the bulk of his argument on the claim that *Heck v. Humphrey* is inapplicable to this case. Some of plaintiff's specific arguments revolve around "factual" matters, i.e., factual distinctions between *Heck* and its progeny, on the one hand, and this case, on the other. Nevertheless, the alleged "factual" differences between *Heck* and the instant case do not raise triable issues of disputed material *fact*. Rather, those "factual" differences (e.g., whether the section 1983 claimant is incarcerated in prison) serve only to raise legal questions: what is the *legal effect* of different facts on the *Heck* rule?

Plaintiff makes much of the distinction, already alluded to above, that the plaintiff/claimant in *Heck* was, and remained, incarcerated for the same conviction his section 1983 claim alleged was invalid. Plaintiff correctly notes that a federal district court has held that *Heck v. Humphrey* does not apply to bar the section 1983 claims of a convicted plaintiff who is out of custody. (*Haddad v. State of California* (C.D. Cal. 1999) 64 F.Supp.2d 930.) Plaintiff overlooks, however, the rationale of the *Heck* rule, which has to do with the interrelationship between section 1983 and federal habeas

corpus law. Where the plaintiff's out-of-custody status effectively precludes any habeas corpus (or other) relief for violation of civil rights, then the requirement of a "favorable termination," as a prerequisite to a section 1983 action, is impossible to fulfill. Where a wronged plaintiff cannot possibly, because of other circumstances, obtain post-conviction relief, then a section 1983 action might appropriately be available to redress a deprivation of rights. (See, e.g., *Spencer v. Kemna* (1998) 523 U.S. 1 [118 S.Ct. 978, 989, 140 L.Ed.2d 43], conc. opn. of Souter, J.)

Here, plaintiff's out-of-custody status did not affect his ability to establish the invalidity, if any, of his misdemeanor resisting arrest conviction. Plaintiff, although out of custody, is subject to probation for three years. Yet, he has never mounted any subsequent challenge to the constitutional basis of his conviction (e.g., via habeas corpus). Plaintiff is not a person who has no recourse to redress alleged constitutional violations. (See, e.g., *Spencer v. Kemna*, *supra*, 523 U.S. at p. 21 [118 S.Ct. 978, 140 L.Ed.2d 43, 59 ["Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's 'broad reach'"] conc. opn. of Ginsburg, J.) Such an individual cannot "revive" a noncognizable section 1983 claim, however, by simply standing by and doing nothing to meet the favorable-termination requirement. Thus, plaintiff here still must show a successful invalidation of his conviction as a prerequisite to maintaining a section 1983 cause of action.

In short, "[i]t is established that a person convicted of resisting or obstructing a peace officer (Pen. Code, § 148, subd. (a)) may not maintain an action for the violation of

federal civil rights (42 U.S.C. § 1983 (section 1983)) based on the officers' conduct during the arrest, unless the conviction has been set aside through appeal or other postconviction proceeding." (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1405-1406.)

Even if *Heck v. Humphrey* is not a bar to plaintiff's civil rights complaint, he has failed to raise any triable issue of material fact concerning the causes of action alleged. Plaintiff attempts to dispute the trial court's ruling by suggesting that he was "not really" resisting the arresting officers. He cannot contradict his own testimony, however, in which he admitted screaming obscenities, turning toward the officer who had cuffed his right wrist, and otherwise moving his body, albeit to relieve pain (in plaintiff's version) rather than simply out of obstreperousness. Under the objective circumstances, however, the officers took reasonable steps, and were authorized by statute to use reasonable force, to overcome what they reasonably perceived to be resistance, or a failure to comply.

Plaintiff sets forth the additional argument that his misdemeanor conviction of resisting arrest (Pen. Code, § 148, subd. (a)(1)) cannot properly be used against him as an admission under Penal Code section 1016. That section provides, in pertinent part: "The legal effect of such a plea [i.e., of nolo contendere], to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes. In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." (Pen. Code, § 1016, subd. (3).)

Plaintiff's misdemeanor conviction of resisting arrest is not being presented or used, however, as an admission. Rather, only the fact of its existence, and the absence of a favorable termination of the judgment of conviction, are being used here, to establish whether or not *Heck v. Humphrey* applies. (*Nuno v. County of San Bernardino* (C.D. Cal. 1999) 58 F.Supp.2d 1127, 1136-1137.) "Absent an allegation in the [complaint] that the plaintiff's section 148 conviction has been reversed on appeal, expunged by executive order, invalidated by a state tribunal or is called into question by a . . . writ of habeas corpus, plaintiff simply has no section 1983 cause of action . . . ." (*Ibid*.)

In addition, we agree with defendants that plaintiff waived any claim under Penal Code section 1016, subdivision (3), by failure to raise that issue below. (Cf. *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184.)

Plaintiff has failed to make a showing that any material issue of fact is disputed and remains to be tried.

DISPOSITION

The judgment is affirmed.

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s/Ward
J.

We concur:

s/Hollenhorst
Acting P. J.

s/King
J.